Nos. 22,572 and 22,572A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 22,572

NATIONAL LABOR RELATIONS BOARD, Petitioner

v.

RAYTHEON COMPANY, Respondent

No. 22,572A

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

and

RAYTHEON COMPANY, Intervenor

On Petition for Enforcement and Petition To Review an Order of the National Labor Relations Board

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PETITION OF THE NATIONAL LABOR RELATIONS BOARD FOR REHEARING AND SUGGESTION OF THE APPROPRIATENESS FOR REHEARING *EN BANC*

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PETITION OF THE NATIONAL LABOR RELATIONS BOARD FOR REHEARING AND SUGGESTION OF THE APPROPRIATENESS FOR REHEARING *EN BANC*

The National Labor Relations Board respectfully petitions this Court to grant rehearing to reconsider a decision of a panel of the Court (Judges Chambers, Koelsch and Browning) entered herein on February 19, 1969, and also suggests the appropriateness of rehearing *en banc*. The Court, *per curiam*, granted the Company's motion to dismiss the petitions herein on the ground that the Board's order became moot when the Board certified the results of a representation election held subsequent to the events in the instant case.

The Board found that the Company, during the course of an election campaign, violated Section 8(a)(1) of the Act by coercively interrogating employees about their union activities, by threatening employees with loss of benefits in the event they chose union representation and by promising employees benefits for abstaining from union activity. Accordingly, in order to remedy these unfair labor practices and to bar their resumption, the Board ordered the Company to cease and desist from engaging in such conduct and to post the customary notice to that effect in its plant. Thereafter, the Board sought enforcement of that order from this Court, and the Union petitioned to review that order.

The Board respectfully submits that this Court's action in dismissing the petitions herein misconceives the function and purpose of a Board cease and desist order and is in direct conflict with applicable Supreme Court decisions.

Thus, it is settled law that "a Board order imposes a continuing obligation; and the Board is entitled to have the resumption of the unfair practice barred by an enforcement decree." *N.L.R.B. v. Mexia Textile Mills, Inc.*, 339 U.S. 563, 567 (1950) and cases cited therein, n. 4, acknowledging the unanimity of the Circuit Courts in support of this view. It is equally well-settled that an order of the Board, "lawful when made, does not become moot because it is obeyed or because changing circumstances indicate that the need for it may be less than when made". *N.L.R.B. v. Pennsylvania Greyhound Lines*, 303 U.S. 261, 271 (1938). Accord: *N.L.R.B. v. Metalab-Labcraft*, 367 F.2d 471, 472-473 (C.A. 4, 1966); *N.L.R.B. v. Marsh Supermarkets, Inc.*, 327 F.2d 109, 111 (C.A. 7, 1963), cert. denied, 377 U.S. 944; *N.L.R.B. v. Clark Bros. Co.*, 163 F.2d

373, 375 (C.A. 2, 1947). See, also, *Wirtz v. Bottle Blowers Ass'n*, 389 U.S. 463, 475-476 (1968).[1]

The decision in this case and in *General Engineering Inc. v. N.L.R.B.*, 311 F.2d 570 (C.A. 9, 1962)—on which the panel in this case relied—squarely conflict with *Mexia* and *Pennsylvania Greyhound, supra.* In the instant case, this Court found that Company abstinence from violations of the Act during the period preceding an election held subsequent to the Board's decision in the unfair labor practice proceeding, obviates the necessity for enforcement of the Board's order. Yet *Mexia* directly held that even *complete* abstinence from unfair labor practices after a Board order and *full* compliance with the order do not lessen the propriety of enforcing that order. 339 U.S. at 567. Thus, under the rationale of *Mexia,* even if the Company had fully complied with the cease and desist and notice posting provisions here, the Board's order would not be moot. See also *N.L.R.B. v. Crompton-Highland Mills, Inc.*, 337 U.S. 217, 225 (1949); *N.L.R.B. v. Trimfit of California, Inc.*, 211 F.2d 206, 208 (C.A. 9, 1954); *N.L.R.B. v. American Potash & Chemical Corp.*, 98 F.2d 488 (C.A. 9, 1938). *A fortiori,* the cessation of unfair labor practices for the comparatively short time of a preelection campaign should not bar enforcement of a Board order.

Similarly, in *Pennsylvania Greyhound, supra,* the Supreme Court enforced a Board cease and desist order barring the company from recog-

[1] The Supreme Court's dictum in *N.L.R.B. v. Jones & Laughlin Steel Co.*, 331 U.S. 416, 428 (1947) to the effect that "where the [Board's] order obviously has become moot, the court can deny enforcement without further ado," does not speak to the contrary. For the question here is whether the Board's order is in fact moot where the Board seeks enforcement for the purposes of having "the resumption of the unfair practice barred by an enforcement decree". *N.L.R.B. v. Mexia Textile Mills, supra,* 339 U.S. at 567.

nizing a company union, where a subsequent Board election had already established another union as the recognized bargaining agent. Surely, if a Board order is appropriate to bar resumption of conduct where the illegally recognized union has been validly replaced by a certified union, an order is appropriate to bar resumption of conduct where the illegal acts (interference with employees' broad Section 7 rights) encompass a wider scope of conduct than that later refrained from (interference with a Board election).[2]

Moreover, other courts which have ruled on the issue of alleged mootness of a Board order have flatly rejected this Court's position in *General Engineering* as unpersuasive. *N.L.R.B. v. Metalab-Labcraft,* 367 F.2d 471, 472 (C.A. 4, 1966); *N.L.R.B. v. Marsh Supermarkets, Inc.,* 327 F.2d 109, 111 (C.A. 7, 1963), cert. denied 377 U.S. 944. As the Seventh Circuit stated, in a case identical to the one at bar, "if the Board's order is justified, it is entitled to have it enforced *as a means of insuring that in*

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[2]Thus, the Board respectfully disagrees with the statement of the Court in *General Engineering* that the Board's finding was solely that the Company "interfered with the employees' right to freely select a bargaining representative in violation of Section 8(a)(1)". 311 F.2d at 572. There, as here, the Board did not merely find that the conduct interfered with the election, but found also that the employer's conduct, even absent the election, interfered with employees' protected rights. The question of whether conduct interferes with an election and whether it violates Section 8(a)(1) are, of course, entirely separate. As we noted in our opening brief (p. 2), the question of the effect of the conduct on the election is not at issue here and, in any event, it is clear that conduct which is an unfair labor practice does not necessarily interfere with an election, nor does conduct which requires setting aside an election necessarily constitute an unfair labor practice. See, e.g., *Foreman & Clark, Inc. v. N.L.R.B.,* 215 F.2d 396, 401, 408-409 (C.A. 9, 1954), cert. denied 348 U.S. 887; *N.L.R.B. v. Shirlington Supermarket, Inc.,* 224 F.2d 649, 652-653 (C.A. 4, 1955), cert. denied 350 U.S. 914; *N.L.R.B. v. Clearfield Cheese Co.,* 322 F.2d 89, 92-94 (C.A. 3, 1963); *Furr's Inc. v. N.L.R.B.,* 350 F.2d 84, 86 (C.A. 10, 1965); *N.L.R.B. v. Tennessee Packers, Inc.,* 379 F.2d 172, 181 (C.A. 6, 1967).

future elections the conduct may not be repeated" (emphasis added). *N.L.R.B. v. Marsh Supermarkets, Inc., supra,* 327 F.2d at 111. Accord: *N.L.R.B. v. Clark Bros. Co.*, 163 F.2d 373, 375 (C.A. 2, 1947). See, also, *N.L.R.B. v. Rippee,* 339 F.2d 315, 316 (C.A. 9, 1964).

In short, the Board's order here is not moot. This Court, by refusing to enforce that order, substitutes for the Board's judgment that an order is necessary to bar resumption of future conduct, its own judgment that no such order is necessary. Yet it has long been settled that the fashioning of appropriate remedial orders is "peculiarly a matter for administrative competence" and that a Board order may not be disturbed "unless it can fairly be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Fibreboard Paper Products Corp. v. N.L.R.B.,* 379 U.S. 203, 216 (1964). We submit that the cases cited above fully establish that an order barring resumption of unfair labor practices effectuates the policies of the Act. This Court should, therefore, determine the case on its merits and, if it finds that substantial evidence supports the Board's order, it should enforce the Board's remedial order to effectuate that purpose.

We respectfully request, therefore, that this Court reconsider its decision in this case and in *General Engineering* in light of the Supreme Court's decisions in *Mexia* and *Pennsylvania Greyhound, supra,* and reject the contention that the change in circumstances here rendered the Board's order moot.

CONCLUSION

For the foregoing reasons, the Board respectfully prays that this petition for rehearing be granted and that, after such rehearing, the Court withdraw its decision of February 19, 1969, and for the reasons stated herein and in the Board's initial brief to the Court, enter a new decision enforcing the Board's order in full. The Board also suggests that in view of the conflict between this Court and other courts, including the Supreme Court, a rehearing *en banc* is appropriate.

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